

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,
Plaintiff,
v.
GARARDO AVILA,
Defendant.

2:05-cr-0102-LDG-GWF

ORDER

Defendant Avila filed a motion to dismiss for post-indictment delay (#20, response #22). The magistrate judge filed a report and recommendation to deny the motion to dismiss (#28). Defendant filed objections to the report and recommendation (#30, response #34) and filed a motion to reconsider the denial of the motion to dismiss (#32, response #33). The magistrate judge filed a report and recommendation to deny the motion to reconsider the order of the original report and recommendation (#38).

In his motion to dismiss, Avila argues that the 29 month delay between his indictment and the date of his first trial setting deprived him of his Sixth Amendment right to a speedy trial. In his report and recommendation, the magistrate judge found that the government was negligent in failing to timely locate Avila for approximately 26 months while he was incarcerated in federal prison in a different case, and for an additional month before he was brought before the court for arraignment. The magistrate judge also found that while Avila's use of aliases made it more

1 difficult for the government to identify and locate him, it did not excuse the government's lack of
2 due diligence in making reasonable efforts to do so. The court sustains those finding by the
3 magistrate judge.

4 Additionally, however, the court also agrees with the magistrate judge that Avila is required
5 to show actual prejudice, and has not met that burden. As the magistrate judge found, and the
6 record supports, Avila has not shown that the alleged witnesses that he argues are no longer able to
7 testify because of faded memories or unavailability would have provided favorable testimony, but
8 for the delay. Accordingly,

9 THE COURT HEREBY ORDERS that the magistrate judge's report and recommendation
10 (#28) is ADOPTED in its entirety, and that defendant's motion to dismiss the indictment (#20) is
11 DENIED.

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13 DATED this 8 day of November, 2007.

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Lloyd D. George
United States District Judge